

1 talking about today?

2 MR. FRIX. Quite frankly, we haven't
3 formulated our position at this point. I don't know
4 what I think.

5 CHIEF ALJ SIPPEL I don't blame you. But
6 the point is, is that this is why I think this is now
7 an appropriate time to address this issue, if, you
8 know, whatever is -- I want to be sure that I'm
9 careful about getting -- recognizing the fact that
10 there are settlement efforts being made. I don't want
11 to -- obviously, you know as well I do that I can't
12 get myself impacted with, you know, who is doing what
13 in that context.

14 MR. FRIX. Understood.

15 CHIEF ALJ SIPPEL: But I certainly want --
16 I encourage it. And if something develops that's
17 final, let me know, as you will. But the point is it
18 hasn't gotten there yet. As far as I'm concerned, the
19 case is still in adjudication.

20 And I have a question that's being raised
21 by one of the parties that's concerned -- raises a
22 concern about what, as I say, I think is the
23 fundamental -- is a fundamental issue to hearings of
24 this type, whether there's been appropriate notice
25 giving under the APA.

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1 MR. FRIX: Well, there is --

2 CHIEF ALJ SIPPEL: Now if that's the case,
3 I can't -- I certainly cannot decide that from here.
4 And based on your response to my hypothetical, I don't
5 see how I can just ignore it now and face it later, if
6 -- well, that's essentially where I'm coming out on
7 this.

8 And the logical thing, the next logical
9 step, of course, would be to set a briefing schedule
10 for however we want to characterize this, a motion to
11 amend an issue or just a motion for clarification --
12 I don't know how you want to do it.

13 But go ahead. I'm sorry.

14 MR. FRIX: Perhaps it would be clearer if
15 I were to answer that there's no question that under
16 (J) there has been notice of a kind given. But mere
17 notice --

18 CHIEF ALJ SIPPEL: Right, yes. It's
19 adequate notice that we're talking about.

20 MR. FRIX: Right. The question --

21 CHIEF ALJ SIPPEL: Fairness, this kind of
22 thing. You know, this is all a question of fairness.
23 It's not a question of I gave you something like a
24 notice. Was the notice given? If the notice hasn't
25 been given, you know, then there's an issue.

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1 MR. FRIX: There was notice -- there was
2 --

3 CHIEF ALJ SIPPEL: And they're entitled to
4 have the issue resolved before -- you know, before we
5 start bringing in the evidence that may go against
6 them. I mean, I'm not saying that they're entitled to
7 get it resolved in their favor. But I'm simply saying
8 they're certainly entitled to raise it at this -- it
9 seems to me. I mean, at least -- I'm hearing this for
10 the first time, so --

11 MR. FRIX: The question would be what is
12 to be advanced? And let me be practical about this.
13 What is to be advanced by, in this case, by dealing
14 with this particular issue at this time. Not
15 generally, not at some point in the case, but at this
16 particular time?

17 And the background for my position and my
18 request frankly is that Globecom -- excuse me --
19 Business Options is a small, struggling family
20 business. And we have done everything we possibly can
21 to minimize the costs, the legal costs, associated
22 with prosecuting this case and getting to a fair
23 resolution.

24 And I think Mr. Shook will join with me
25 that we have -- this is an issue that we have

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1 repeatedly taken from day one. I know in some senses,
2 that's irrelevant to the legal process, and yet it
3 does have a practical effect.

4 The type of fees that are incurred by the
5 legal process here itself have the ability to simply
6 cause the dissolution of this business.

7 And I don't mean to overstate that case,
8 and I understand there's an element that has no
9 meaning here, but when things are in the balance of
10 this nature, and if there is not something particular
11 to be gained for it to be resolved at this stage of
12 the case, as opposed to a later stage of the case, it
13 would be my request that we now resolve it right now.

14 CHIEF ALJ SIPPEL All right. Let me hear
15 Mr. Shook's response to that.

16 MR. SHOOK: Your Honor, actually, a
17 variety of issues have come up as a result of Mr.
18 Frix's response to your questions. And I'll simply
19 raise them. I don't intend to go into great detail at
20 this point.

21 First of all, with respect to the
22 slamming, Mr. Frix had made a number of arguments
23 about how the Commission dealt with slamming. Well,
24 one of the ways in which the Commission has dealt with
25 slamming is to impose forfeitures of 40,000 dollars as

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1 a base amount for a violation of the slamming rules,
2 which is a penalty separate and apart from any
3 restitution that may be required under the rules. And
4 there are an number of cases in which this has
5 occurred.

6 So to suggest that the slamming aspect of
7 this case is unprecedented or relatively new or
8 something that, you know, we're simply picking on
9 Business Options is totally uncalled for.

10 There's a great deal of precedent out
11 there already with respect to carriers being forced to
12 pay 40,000 dollars or more per slam, depending on the
13 circumstances of their situation.

14 With respect to the notice that was given
15 here with respect to universal service contributions,
16 the failure to make those contributions, there are
17 upper limits set in the rules with respect to what a
18 common carrier can be required to pay.

19 We're not seeking those upper limits.
20 Those could be in the millions of dollars, depending
21 on whether or not the various failures to pay are
22 viewed as continuing violations, and that you can get
23 to 1.2 million dollars per continuing violation.

24 That's an astronomical sum. We're not
25 asking for that. We're not seeking that. We don't

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1 expect to be able to prove that, and we don't think
2 it's appropriate, with respect to the upper limit,
3 that could be set with respect to Business Options.

4 We do believe that the Globecom case does
5 set an appropriate amount with respect to an upper
6 limit. We also think it would be appropriate to have
7 that upper limit spelled out completely, as opposed to
8 being left fuzzy, which is what it is right now.

9 And so we're suggesting use of Globecom as
10 the basis for determining what an upper limit could
11 be. It's not necessarily what a forfeiture would be.
12 That's a matter of proof at hearing. For all I know,
13 we would not even get remotely close to that,
14 depending on how the facts of this played out.

15 But we do think that as a matter of
16 Commission practice, it would be more appropriate to
17 set the upper limit and to make it crystal clear what
18 it could be or at least as clear as possible under the
19 circumstances, as opposed to simply leaving it fuzzy,
20 which is, I think, what the case is now.

21 CHIEF ALJ SIPPEL: Let me ask you this.
22 I'm not trying to put you on the spot, but I just --
23 I really can't help it. When it was -- when the
24 amendment, when the gen. language was proposed to me,
25 was given to me, was that -- was the omission of a

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1 dollar amount in that section, was that just an
2 oversight? I'm not trying to embarrass anybody, but
3 I'm trying to figure out has something happened since
4 then that made this important --

5 MR. SHOOK: I can speak --

6 CHIEF ALJ SIPPEL: -- as opposed to it not
7 having been so important at that time?

8 MR. SHOOK. Your Honor, unfortunately, I
9 wish I knew, you know, exactly the answer to that
10 question, but I really don't.

11 CHIEF ALJ SIPPEL: All right. That's all
12 -- I'm not going to pursue it.

13 Look, I'm going to have to have this --
14 I'm going to have to have the question briefed. I am
15 -- obviously, I'm certainly not going to give a bench
16 ruling on, you know, on giving Mr. Shook the relief
17 that you're looking for, you know, when we have, you
18 know, ex post facto issues. We've got notice issues.
19 We've got all kinds of issues here.

20 But on the other hand, I don't think it's
21 all that complicated either, that it's going to be
22 overburdensome on BOI. I mean, you know, I know I
23 keep hearing that BOI is on the fringe of bankruptcy
24 or is -- look, I mean, there's nothing I can do about
25 that. It's -- I've got no intention of hurting

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1 anybody.

2 But if it gets so bad, I mean, you can --
3 you know, BOI can always walk away. There's nothing
4 I can do about that.

5 I mean, but I've got to give the other
6 party an opportunity to put its case in the way it
7 feels it needs to and to preserve the integrity of an
8 issue. I mean, you could go the other -- I mean, it
9 could have come in the other way. You could have come
10 in to dismiss that issue as being inadequate notice,
11 and I would have had to address it.

12 So, I mean, there's no sense of debating,
13 you know, whether this is the proper time to do this
14 kind of a thing.

15 Let's get a schedule down. And I think we
16 probably ought to treat this, at least in terms of the
17 pleading cycle, as though it were a motion to amend,
18 which means a motion in opposition and a reply.

19 All right. So when --

20 MR. SHOOK: So in other words, it's --
21 we're viewing this as, I guess, a secondary motion to
22 enlarge?

23 CHIEF ALJ SIPPEL: Well, you can
24 characterize it any way you want, if you want to go
25 back and think about it. I don't care how you want to

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1 do it. But in terms of the pleading cycle, I want to
2 see -- I want to see a motion. I want to see an
3 opposition. I want to see a reply to the opposition.

4 Now whether this could be a motion to
5 amend an issue, the motion for clarification of an
6 issue, you know, you can characterize it any way you
7 want.

8 MR. SHOOK: We'll figure out what title to
9 put on it.

10 CHIEF ALJ SIPPEL: You can figure out your
11 title. That's -- you're entitled to your title
12 rights.

13 But let's get dates That's my big --

14 MR. FRIX: Your Honor, if I could take one
15 more moment.

16 CHIEF ALJ SIPPEL: Yes, I didn't mean to
17 shut you off, but I mean, I'm, you know -- go ahead.
18 Go ahead.

19 MR. FRIX: And I do understand what you
20 had said and understand what you're ruling. I'm now
21 seeking reconsideration of that, effectively.

22 I think the point that you -- the sentence
23 that you said right before you ordered us to file
24 these two -- to respond by motions, it is exactly the
25 heart of the case, is exactly the heart of the issue.

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1 Is there something that makes it important at this
2 moment, that the issue -- that we insert the issue of
3 200,000 dollars in this (J) that didn't require that
4 insertion before? I think that's exactly right.

5 And frankly, we -- if I could -- we relied
6 upon this issue (J) as it was. We looked at it,
7 reviewed it, relied upon it, and we did not oppose it.

8 CHIEF ALJ SIPPEL: I know. I understand
9 what you're telling. That --

10 MR. FRIX: So now essentially they're --
11 essentially opposition is that the Commission is now
12 trying to insert, by the way, just draw a line,
13 200,000 dollars in here. Now it didn't feel the need
14 to put the 20,000 that was the prior case, the prior
15 standard in there. And we understood that, and our
16 position was that issue did not need to be dealt with
17 right here.

18 The mission struck us as not particularly
19 meaningful at that point in time because it was such
20 a very clear precedent, that is 20,000 dollars. And
21 frankly, the Commission -- the Bureau will argue
22 whatever they want to argue in the event that we get
23 to the point of a remedy.

24 But with all due respect, I don't
25 understand any reason why we're at this point, now,

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1 allowing the insertion, basically drawing in a 200,000
2 dollar figure at the --

3 CHIEF ALJ SIPPEL: We haven't gotten there
4 yet. I mean, I wish you'd bear with me. We haven't
5 gotten there yet. And the point that you're making is
6 why I have -- which, you know, you picked up on my
7 question. Okay.

8 But that's one of the reasons why I want
9 to have opposition and reply. Because whatever you're
10 going to raise on this kind of an issue, the Bureau is
11 going to have to respond to it. And I can't rule on
12 this until I get the whole thing laid out. You know,
13 it's all got to be laid out.

14 MR. FRIX: My question would be is there
15 a reason for ruling at this time at all?

16 CHIEF ALJ SIPPEL: Well, I think I -- I
17 think I've already decided that yes, there is. I mean
18 because they have a right to a ruling, not because I'm
19 saying that, boy, this is a great time to do this. I
20 mean, I think it would have been a greater time to do
21 it back in August. And I think it might have even
22 been a greater time to do it when the notice of
23 apparent liability was issued back in whenever.

24 But, no, we don't have that here. What
25 I'm talking -- we have an order to show cause.

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1 So this -- I'm not -- that was back in
2 April of 2003. That would have been a great time to
3 do it. So I'm not getting into that business of, gee,
4 this is not a nifty time to do it.

5 I'm saying that they have a right.
6 They're a party to this case and they have a right to
7 have this clarified one way or the -- up or down. And
8 you have a right, certainly, to respond to it. And
9 I've told you, I've been very candid right up front
10 here in terms of I've got concerns. So --

11 MR. FRIX: We'll --

12 CHIEF ALJ SIPPEL. That's as much as I can
13 do.

14 MR. FRIX: I imagine that other parties
15 will actually have -- there are a number of other
16 parties who potentially could be affected by this
17 issue that are not in this case right now.

18 CHIEF ALJ SIPPEL: Well, they're not going
19 to come in. They're not invited to come in and file
20 anything. They're not going to intervene for that
21 reason, if that's what you're -- I'm not sure what you
22 -- why you're telling me that.

23 MR. FRIX: Well, as a member of the
24 private bar, we're concerned the Commission has
25 adopted a new policy without proper rulemaking

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1 authority for the new policy.

2 CHIEF ALJ SIPPEL: That's a policy
3 question. I'm concerned about a notice. You can take
4 this policy issue all the way up to the Court of
5 Appeals with this case, if it goes all the way there.

6 But the only thing that I have to do is be
7 sure that this case is being run in accordance with
8 the APA. That's all I have to do at this point. And
9 I certainly am not criticizing any Commission policy
10 or anything like that. It's up to the Commission to
11 set the policy.

12 But I have to run this case under the APA
13 with adequate notice. And that's the guts -- what I
14 think is the guts of what's going on here, plus giving
15 the parties the right to ask for relief in an
16 appropriate way, at an appropriate time.

17 So let's go back to dates, please. You
18 want to set the dates now? Why don't we do it now?

19 MR. SHOOK: We may as well.

20 CHIEF ALJ SIPPEL: I don't have a calendar
21 with me, but how much time would you need to file your
22 motion? You all want to discuss --

23 MR. HAWA: Well, this will involve
24 revising the entire procedural schedule. So we should
25 probably look at all the dates, don't you think?

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1 CHIEF ALJ SIPPEL: Well, I don't know that
2 I'm going to do that That's not what we're going to
3 do. Let's go off the record --

4 CHIEF ALJ SIPPEL: I don't think that's
5 necessary, and two weeks should suffice for us to get
6 the motion to you.

7 CHIEF ALJ SIPPEL: All right. Let's stay
8 on the record. You say two weeks. You need two weeks
9 to get your motion in?

10 MR. SHOOK: Right.

11 CHIEF ALJ SIPPEL: All right. How much
12 time would you need to oppose it?

13 MR. HAWA: Well, two weeks would be
14 roughly -- you want to say -- if you were to say
15 Friday the 21st, which would be two weeks and two
16 days. That's the week before Thanksgiving.

17 CHIEF ALJ SIPPEL: Sure. That's -- well,
18 that doesn't cut into Thanksgiving, then, on that side
19 of it. That's 11/21

20 MR. HAWA: So --

21 CHIEF ALJ SIPPEL: What day of the week is
22 that?

23 MR. HAWA: Friday the 21st is --

24 CHIEF ALJ SIPPEL: So Friday. Okay.

25 MR. HAWA: It's two weeks and two days, so

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1 if you had until the end of that week.

2 CHIEF ALJ SIPPEL: So would that be --
3 would that give you enough lead time to get it in?

4 MR. SHOOK: Oh, certainly.

5 CHIEF ALJ SIPPEL Can you get it in
6 before then?

7 MR. SHOOK: We can, and we will.

8 CHIEF ALJ SIPPEL: All right. That would
9 be a bye date. And then how much time would you need
10 to respond to him? I mean, you know what the issues
11 are. What do the rules give in terms of an opposition
12 to a motion to --

13 MR. SHOOK: I believe it's ten days, but
14 then depending on whether the motion is viewed as
15 mailed or --

16 CHIEF ALJ SIPPEL: Well --

17 MR. SHOOK: We have typically, even though
18 we have sometimes given each other either electronic
19 service or hand delivery on the same day --

20 CHIEF ALJ SIPPEL: Okay.

21 MR. SHOOK: -- we've reflected on the
22 certificate of service that the document was mailed.

23 CHIEF ALJ SIPPEL: Okay.

24 MR. SHOOK: -- so as to give them the
25 extra mail days.

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1 CHIEF ALJ SIPPEL: Okay.

2 MR. SHOOK: And we would continue that
3 practice here.

4 CHIEF ALJ SIPPEL: All right. Well, why
5 don't we do that? Why don't we do it with the mail
6 dates, and then that should get you over the hump of
7 the --

8 MR. HAWA: Could we set the reply at
9 Friday --

10 CHIEF ALJ SIPPEL: Let me just finish. I
11 want to finish my thought. I'm trying to acknowledge
12 the fact that there is a Thanksgiving holiday in here.
13 So if you get the three-day add-on, the ten plus the
14 three, even though you're going to have it before,
15 that should give you enough time.

16 Now, I'm sorry, now go ahead. You tell me
17 what you want to say.

18 MR. HAWA: That would basically be
19 Thursday the 4th. We were going to propose Friday the
20 5th.

21 CHIEF ALJ SIPPEL: Friday the 5th. Is
22 that okay with you, Mr. Shook?

23 MR. SHOOK: That's fine.

24 CHIEF ALJ SIPPEL: Okay. So that -- these
25 are going to be -- okay, 12/5. And then you have how

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1 many days after that? Usually --

2 MR. SHOOK: I believe it's five.

3 CHIEF ALJ SIPPEL: Five.

4 MR. SHOOK: And whether or not we exercise
5 the right of reply, I believe will depend entirely on
6 how we perceive the opposition.

7 CHIEF ALJ SIPPEL: All right. Well, you
8 let me know right --

9 MR. SHOOK: -- if there's something in
10 there that we need to respond to, we will. Otherwise,
11 we can alert both Your Honor and Business Options that
12 no reply would be filed.

13 CHIEF ALJ SIPPEL: Okay. Now that's --
14 okay. So that's December 5. What day of the week is
15 that?

16 MR. SHOOK: Friday.

17 CHIEF ALJ SIPPEL: All right. All right.
18 SO then the five days would be -- would get you to --

19 MR. SHOOK: It could get us to the
20 following Friday.

21 CHIEF ALJ SIPPEL: All right.

22 MR. SHOOK: We could forego --

23 CHIEF ALJ SIPPEL: Would that be the 12th?

24 MR. SHOOK: That would be the 12th.

25 CHIEF ALJ SIPPEL: And you can forego

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1 what?

2 MR. SHOOK: The mail days.

3 CHIEF ALJ SIPPEL: Well, we'll just use
4 those as firm dates, 11/21, 12/5 and 12/12.

5 Now, you're suggesting that this might
6 impact the other procedural dates. Now let me tell
7 you a little bit about those procedural dates because
8 I already had -- I bumped another case, another case
9 that was a dead ringer, never to be litigated. And
10 guess what happened? It's back in litigation.]

11 So I'm worried about these dates. And I
12 don't see any reason, particularly in light of your
13 argument, that -- Mr. Frix's argument -- that it
14 doesn't make any difference when we decide this
15 question, whether it's now or after all the evidence
16 is in. And that's my point. This should not distract
17 from preparation for the hearings. It's just I don't
18 see how it should. It is not that -- it is not that
19 -- such a complicated issue. It certainly is not
20 going to require depositions and affidavits and all
21 this other kind of thing. It shouldn't. And I don't
22 see why this can't be done. You've got two able
23 lawyers on your team. There's no reason -- plus
24 whatever you have back. I don't know what you have
25 back at the ranch I can't believe that this can't be

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1 done. So I don't want to --I really -- I don't want
2 to hear this as an excuse to change the procedural and
3 the hearing date. So please bear with me.

4 Okay? You understand each other?

5 MR. SHOOK. We had no intention of --

6 CHIEF ALJ SIPPEL: No, I'm not -- I wasn't
7 talking to your side of the table on this one, Mr.
8 Shook.

9 Okay. Now I don't have anything really
10 more to discuss. I mean, we do have dates, and that's
11 really what I'm here to determine. There is -- and
12 any time that there is a question, any time you think
13 that you've got a solution to this case by way of
14 settlement, whatever -- I'm using that term very
15 generically -- please let me know right away. And I
16 take it we don't have anything to talk about there?

17 MR. SHOOK: Well, only that we have
18 received an offer from Business Options, which we are
19 currently considering.

20 CHIEF ALJ SIPPEL: All right. That
21 doesn't impact anything that we're going here today or
22 in January?

23 MR. SHOOK: I would say not at this point.

24 CHIEF ALJ SIPPEL: Okay. Well, I just
25 want to be sure that that message gets relayed back to

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1 Mr. Tinsel, that, you know, we're still in business.
2 We're still sticking with these dates.

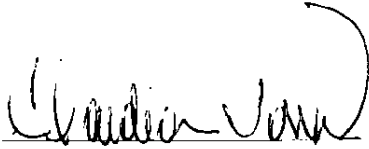
3 Thank you very much. We're in recess
4 until whatever the next date is. Thank you.

5 (Whereupon, the above-entitled matter was
6 adjourned at 9:48 a.m.)

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CERTIFICATE OF SERVICE

I, Claudia F. Torres, hereby certify that true and correct copies of the foregoing Business Options, Inc.'s Opposition to the Enforcement Bureau's November 21, 2003 Motion were sent by hand delivery to the following individuals on this 5th day of December, 2003



Claudia F. Torres

Copies to:

Hon. Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W. Room 1-C864
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